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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re the Patent Application of:)
Erik T. Donhowe)
Serial No.: 10/047,411) Art Unit: 1761
Filed: 01/16/2002) Examiner: Kuhns, Sarah
Louise
Title: Product and process of making an)
alcohol containing sport drink)

Honorable Commissioner of
Patents and Trademarks
Washington, D.C. 20231

AMENDED APPEAL BRIEF

This Amended Brief is in response to a Notification of Non-Compliant Appeal
Brief mailed 10/14/2005.

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I. REAL PARTY IN INTEREST

The inventor, Erik T. Donhowe, is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

This appeal may be directly affected by a concurrently filed Appeal for patent application 10/078,207 filed on 02/20/2002 entitled "Product and process of making a protein, vitamin, mineral and antioxidant fortified sport beer", which has the same inventor and real party in interest as the subject of this Appeal Brief.

III. STATUS OF THE CLAIMS

Claims 1-16 have been previously canceled.

Claims 16-35 are currently pending in the above-referenced application.

Claims 29-32 were withdrawn from consideration and are not the subject of this appeal.

Claims 16-28 & 33-35 were rejected in the Final Office Action mailed 04/13/2004, and are the subject of this appeal.

IV. STATUS OF AMENDMENTS

In response to the Final Office Action mailed on 04/13/2004, Appellant filed a timely a Notice of Appeal.

There are no outstanding amendments that have not been acted upon.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

A non-brewed beverage is recited in independent claim 16. The beverage includes: 60% to 99.5% water by volume (*see page 4, lines 2-10*); 0.45% to 40% ethyl alcohol by volume (*see page 4, lines 2-10*); 3.3 grams to 50 grams per liter concentration of hydrolyzed protein (*see page 4, lines 2-10; and as filed claim 4*); 10%-100% of the United States Food and Drug Administration's Daily Value (DV) amount of vitamin C in a serving (*see page 4, lines 2-10*); and wherein the beverage is one of substantially clear and substantially translucent (*see page 4, lines 2-10*).

A beverage is recited in independent claim 33. The beverage includes: alcohol in a concentration of 0.45% to 40% (*see page 4, lines 2-10*); and hydrolyzed protein in a concentration of 3.3 to 50 grams per liter (*see page 4, lines 2-10; and as filed claim 4*); and wherein the beverage is one of substantially clear and substantially translucent (*see page 4, lines 2-10*).

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Ground 1 - Whether one or more of the pending claims are unpatentable under 35 U.S.C. 103(a) over the Applicant's Admissions in view of Pass The Gas (www.danchan.com/weblog/PassTheGas/73041)

Ground 2 - Whether claims 17, 19, 20, 23 & 34 fail to comply with the written description under 35 U.S.C. 112, first paragraph.

Ground 3 - Whether claims 16-28 & 33-35 are indefinite under 35 U.S.C. 112, second paragraph.

VII. ARGUMENT

Ground 1 - Whether one or more of the pending claims are unpatentable under 35 U.S.C. 103(a) over the Applicant's Admissions in view of Pass The Gas (www.danchan.com/weblog/PassTheGas/73041)

35 U.S.C. Section 103 states:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The Commissioner for Patents through the Examiner bears the initial duty of supplying a factual basis supporting a rejection of a patent application including the rejection of the application's claims based on obviousness. *See 35 U.S.C. 132; and see also In re Oetiker*, 977 F.2d 1443, 1447 (Fed. Cir. 1992).

The law is well settled that for the Examiner to meet the initial duty specifically concerning obviousness, he/she must present a prima facie case of obviousness. *In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984); and see e.g. *Ex parte Skinner* 2 USPQ 2d 1788, 1788-89 (B.P.A.I. 1987).

The Federal Circuit has laid down three very specific criteria that must be met to establish a prima facie case of obviousness. First, the prior art reference(s)

must teach or suggest all the claim limitations. See *In re Royka*, 490 F.2d 981 (CCPA 1970). Second, There must exist within the prior art a motivation to combine or modify prior art references. See *In re Kotzab*, 217 F.3d 1365, 1370 (Fed Cir. 2000). Finally, there must be a reasonable likelihood of success that any combined or modified prior art will produce the claimed invention. See *In re Merck*, 800 F.2d 1091 (Fed. Cir. 1986).

The Applicant respectfully submits that the Examiner has not made a prima facie case of obviousness concerning any of the pending claims. For purposes of this issue only, Claims 17-28 & 34-35 fall with their respective independent Claims 16 and 33, but as individually identified herein concerning this issue stand separately from their respective independent claim. Specifically, the reference(s) cited by the examiner fail to teach or suggest all of the limitations of each claim. Accordingly, for at least this reason the Examiner has failed to present a prima facie case of obviousness concerning any of the pending claims.

Rather, to counter any deficiencies in the satisfaction of the prima facie obviousness criteria, the Examiner chose to improperly rely upon *In re Levin*, a Court of Customs and Patent Appeals dating to December 12, 1949 that established a per se rule concerning food product inventions. 84 USPQ 232 (CCPA 1949). The case, however, was decided on inventiveness, a standard that was supplanted by the obviousness standard with the passage of 35 U.S.C. 103 in 1952 and accordingly, is inapposite to the obviousness rejections in this case. In this regard, *In re Levin* is no longer applicable law concerning patentability.

Specifically, *In re Levin* provides a per se rule concerning the patentability of food stuffs. *Id.* At 234. Perhaps, this rule was necessary in the pre 35 U.S.C. 103 days of patent law, but since then the courts have clearly indicated the only basis

for denying patentability to a useful invention is the lack of novelty or obviousness as specifically described in the 35 U.S.C. 102 and 35 U.S.C. 103. Relatively recent cases concerning software, business methods, and living organisms expound on the proper manner of determining patentability and eschew the use of judicially created exceptions to the proper and required application of 35 U.S.C. 102 and 103. See generally *AT&T v. Excel Communications Inc.*, 172 F.3d 1352 (Fed. Cir. 1999); *State Street Financial v. Signature Financial*, 149 F.3d 1368 (Fed. Cir. 1998); and *In re Chakrabarty*, 447 U.S. 303 (1980). Even more directly on point, the Federal Circuit made it very clear in 1995 that there are no per se rules when determining obviousness under 35 U.S.C. 103. *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995). Accordingly, the Examiner's reliance on this case is a misplaced substitute for presenting a proper prima facie case of obviousness.

Although not binding precedent but definitely persuasive, this Board has also weighed-in specifically concerning the per se rule of *In re Levin* and food stuffs in *Ex parte Earl L. Johnson*. Appeal No. 1997-2565 (BPAI). This case is also very illuminating in so much as the subject invention relates to a beverage, and in many respects the rejection proffered by the Examiner in that case is nearly the same as the rejection put forth in the present case on appeal. Essentially, the Examiner made a rejection of a drink consisting of orange juice and tomato juice concentrate with added preservatives. The Examiner relied upon reference that teaches combining tomato and orange juice along with mint leaves, sugar, and lime juice in combination with two references that teach adding preservatives to foods including citrus juices. The Examiner apparently dismissed the need to consider the differences between the claimed beverages and the relied upon references despite the fact the beverage was claimed using "consisting essentially

of” language. *Id.* at 2-3. Rather in her answer to the appeal, the examiner stated that “nothing new or unexpected is seen in varying the amounts of ingredients” and called attention to *In re Levin* and printed the following paragraph from that case:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Id. at 5 (citing *In re Levin* at 234). This very same paragraph was cited by the Examiner in the present case in support of his obviousness rejection.

The Appellant in *In re Earl Johnson*, presented two arguments: (1) The examiner improperly applied *In re Levin* as a per se rule; and (2) the relied upon references did not teach the claimed invention. *Id.* Essentially, the same arguments are presented herein. The Board agreed with the appellant and firmly

stated “...there are no per se rules when determining obviousness under 35 U.S.C. section 103.” Id. at 6-7. To support that position the board quoted Ochiai:

The use of per se rules, while undoubtedly less laborious than a searching comparison of the claimed invention-including all its limitations with the teachings of the prior art, flouts section 103 and the fundamental case law applying it. Per se rules that eliminate the need for fact-specific analysis of claims and prior art may be administratively convenient for PTO examiners and the Board. Indeed, they have been sanctioned by the Board as well. But reliance on per se rules of obviousness is legally incorrect and must cease. Any such administrative convenience is simply inconsistent with section 103, which, according to *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966)] and its progeny, entitles an applicant to issuance of an otherwise proper patent unless the PTO establishes that the invention as claimed in the application is obvious over cited prior art, based on the specific comparison of that prior art with claim limitations. We once again hold today that our precedents do not establish any per se rules of obviousness, just as those precedents themselves expressly declined to create such rules. Any conflicts as may be perceived to exist derive from an impermissible effort to extract per se rules from decisions that disavow precisely such extraction.

Id. at 7 (citing *Ochiai* at 1572). Emphasis added. The Board then paraphrased the court in *Ochiai*, at 71 F.3d at 1570, 37 USPQ2d at 1132, there are not [Levin] obviousness rejections . . . but rather only section 103 obviousness rejections. Id. Emphasis added. The present Appellant agrees completely with the Board's findings concerning per se rules.

Next, the Board discussed the standard to be used by an examiner in making a prima facie case of obviousness. They commented that an examiner must explicitly address the *Graham v. John Deere Co.* criteria. See 383 US 1 (1966). The board added "In addition, care must be exercised in citing case law predating *Graham v. John Deere*. In re Earl Johnson at 8. Ultimately, since the reference relied upon by the examiner in this case did not teach the same combination of elements as the claimed beverage, the Board reversed the examiner's rejections. Id. at 11.

As stated above, the Examiner of the present application on Appeal failed to provide references that teach and suggest each and every limitation in each claim. The Federal Circuit has indicated that in order for it to review a decision by the Board of Patent Appeals and Interferences and the USPTO, the Board must provide administrative record showing the evidence on which the findings are based, accompanied by the agency's reasoning and reaching its conclusions. See *In re Zurko*, 258 F.3d 1379, 1386 (Fed. Cir. 2001). Such a requirement can be applied to an examiner as well, since the Board will not be able to make an informed and reasoned decision without an adequate record from an examiner.

Concerning claim 16, the references relied upon by the Examiner fail to teach or suggest directly or implicitly the use of "hydrolyzed protein" in the specified concentration. Proteins used in protein shakes are insoluble and not

hydrolyzed. No evidence has been presented indicating the protein in the shake in the examiner's reference was different from other protein shakes and that it contained hydrolyzed protein. In fact, the term "shake" typically implies a relatively fixed opaque beverage, which often indicates the presence of insoluble solids contained in suspension. Further, the references relied upon by the examiner fail to teach or suggest directly or implicitly the use of vitamin C in alcoholic beverage in the required concentration.

Issue 2 - Whether claims 16-20, 23 & 34 fail to comply with the written description under 35 U.S.C. 112, first paragraph.

The fundamental factual inquiry concerning the written description requirement is whether the originally-filed specification conveys with reasonable clarity to those skilled in the art that, as of the filing date sought, the applicant was in possession of the invention as now claimed. *Vas-cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64 (Fed Cir. 1991). The originally filed claims are considered part of the originally-filed specification. *See In re Koller*, 613 F.2d 819 (CCPA 1980).

A. Concerning claim 17, the Examiner asserts that no written description support is provided for the range of 10%-100% of the United States Food and Drug Administration's Daily Value(DV) for vitamins B2, E, B1, B6 and A. The originally-filed specification states in the first paragraph of page 4:

The beverage described in this invention is clear and translucent, and is composed of 60% to 99.5% water by volume, 0.45% to 40% ethyl alcohol by volume, 3.3 to 50 grams/liter, 0.1 to 50 grams/liter

buffers, 3.3 to 50 grams/liter minerals (iron, calcium and zinc), 0.01 mg/liter to 1 grams/liter antioxidants (Vitamin C, Vitamin E and selenium, 10% to 100% of U.S. Recommended Daily Value of vitamins (Vitamin A, Vitamin E, Vitamin C, Vitamin B1, Vitamin B2, Vitamin B6, and Vitamin B12), and flavor extract.

Simply, the stated section of the specification provides direct incontrovertible written description support for claim 17.

B. Concerning Claims 19 and 20, the Examiner asserts that the specification fails to support for the requirement that the whey or soy of Claim 19, or the rice protein of Claim 20 be hydrolyzed. Specifically, Claim 19 recites "...the hydrolyzed protein comprises one or soy or whey". Claim 20 recites, "...the hydrolyzed protein comprises rice protein."

Hydrolyzed protein is protein that has been processed via hydrolysis to break the protein down into smaller molecules. As known to those skilled in the art, one of the primary advantages offered by hydrolyzed protein over unhydrolyzed protein is its much greater solubility in water. The use of hydrolyzed proteins is indicated in several places in the as-filed specification; namely, the list of the composition of Example 1 on page 5 and the list of the composition of Example II also on page 5.

The specification implicitly indicates need to use the soluble protein in several places in the specification by mentioning the resulting beverage is "clear/translucent" in paragraph 5 on page 3, and the as-filed Claim 1 & 15, which were canceled. It is known by those of ordinary skill in the art that a beverage containing the required concentrations of insoluble protein would not

be either clear or translucent but substantially opaque. The proteins listed in the referenced claims are typically insoluble in water unless processed to increase their solubility. The specification only mentions one process that is suitable for substantially increasing the solubility of protein in water, namely, hydrolyzation through the use of the phrase “hydrolyzed protein” in the lists of Examples I and II.

Support for the use of the various different types of protein is provided in Claim 4 of the as-filed application, which has been since canceled. Specifically Claim 4 states, “...the supplemental protein consists of whey, casein, soy protein, rice protein, albumin, hydrolyzed protein and/or highly branched chain amino acids.” The use of the “and/or” conjunction in the claim clearly indicates anyone one protein type could be used by itself or in any suitable mixture of the listed elements.

As stated above, the relevant inquiry concerning section 112, first paragraph is whether the applicant was in possession of the invention as now claimed at the time of filing. The appellant clearly anticipated the use of any one of the listed proteins alone or in combination with each other. The appellant implicitly indicated that the protein in the resulting beverages soluble by indicating the beverage be clear or translucent. The appellant indicated that the protein used in the Examples be hydrolyzed. Since the various types of proteins indicated in the specification and the pending claims are not soluble in water, it would be undoubtedly clear to someone of ordinary skill in making beer that the appellant at the time of filing intended any protein including those indicated in the claim to be made soluble using the process of hydrolyzation.

C. Concerning Claim 23, the Examiner asserts the specification does not provide support for the phrase “about 40%” in reference to the amount of ethyl alcohol in the claim beverage. The composition of Example 3 on page 6 lists “Ethyl Alcohol” 40%” in reference to a beverage further containing peppermint flavoring as also required by the claim. Accordingly, the as-filed specification provides written description support for this limitation.

D. Concerning claim 34, the Examiner asserts the specification does not provide support for the phrase “about at least 25%” as it relates to the USDA’s Recommended Daily Value percentage of Vitamin C in the claimed beverage. First, the pertinent phrase as it appears in Claim 34 is “about 25%” not “at least about 25%”. The specification on page 5, second paragraph specifically states about Example 1, “the beverage has ... vitamins at 25% of the RDA values.” The composition of the vitamins that can comprise the beverage recited in the specification specifically includes Vitamin C. *See Appellant’s Specification, pg 4, paragraph 1.* Accordingly, the as-filed specification provides written description support for this limitation.

Issue 3 - Whether claims 16-28 & 33-35 are indefinite under 35 U.S.C. 112, second paragraph.

A. Concerning Claims 17, 23 & 34, the Examiner asserts they are indefinite “because the scope of the term ‘about’ is unknown”. The Federal Circuit Court of Appeals has found that the term “about” does not generally render a claim indefinite. *W.L. Gore & Assoc. v. Garlock, Inc.*, 721 F.2d 1540, 1557 (Fed. Cir. 1983).

"About" is not an arbitrary term, but rather a flexible word with a meaning similar to "approximately" or "nearly". *Ex parte Eastwood*, 163 USPQ 316,317 (Pat. Off. Bd. App. 1968). The term about when used in conjunction with a numerical quantity can normally be interpreted to encompass a range of values within the scientific convention of rounding. *Viskase Corporation v. American National Can Co.*, 261 F.3d 1316 (Fed. Cir. 2001). Accordingly, as used herein the term, "about" can be interpreted likewise and is not indefinite.

B. Concerning claims 16 and 33, the Examiner contends they are indefinite the scope of the phrases "substantially clear" and "substantially translucent" are unknown. Specifically, the Examiner wrote, "it is not clear how these two phrases describe separate subject matter".

The term "clear" when in terms of a liquid or beverage would be one that has no coloration, i.e. "clear water" or "PepsiClear™". In contrast, "translucent" is used to refer to a liquid or beverage which permits light to pass therethrough, but the light is in someway altered or hindered. For instance, the light may be diffused somewhat or certain wavelengths of light may not be able to pass through a translucent beverage. An example of a translucent beverage would be Kool-Aide™, which is typically will not allow light of a wavelength the same as the color of the beverage pass therethrough but will allow all other wavelengths to pass. Accordingly, the terms are not indefinite in the sense that they do identify separate subject matter.

Further, even if for sake of argument, one assumes that "clear" and "translucent" have the same meaning, it is not clear to the Appellant how this makes either claim indefinite. Specifically, claim 16 states, "the beverage is one of

substantially clear and substantially translucent." Assuming the terms to the same meaning, the referenced wherein clause would be grammatically awkward, but it would not present a problem in ascertaining the scope of the claim.

Respectfully submitted,
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VIII. APPENDIX OF CLAIMS

1-15. (canceled)

16. A non-brewed beverage comprising:

60% to 99.5% water by volume;

0.45% to 40% ethyl alcohol by volume;

3.3 grams to 50 grams per liter concentration of hydrolyzed protein;

10%-100% of the United States Food and Drug Administration's

Daily Value (DV) amount of vitamin C in a serving; and

wherein the beverage is one of substantially clear and substantially translucent.

17. The non-brewed beverage of claim 16, further comprising vitamin B2,

vitamin E, vitamin B1, vitamin B6, vitamin B12, and vitamin A each at

amounts in a serving between about 10% and 100% of the United States

Food and Drug Administration's Daily Value (DV).

18. The non-brewed beverage of claim 16, wherein the hydrolyzed protein

comprises high branched chain amino acids.

19. The non-brewed beverage of claim 16, wherein the hydrolyzed protein comprises one of whey or soy.
20. The non-brewed beverage of claim 16, wherein the hydrolyzed protein comprises rice protein.
21. The non-brewed beverage of claim 16, further comprising 0.01 mg to 1 grams per liter of vitamin E or selenium.
22. The non-brewed beverage of claim 16, further comprising a concentration 0.01% to 0.5% by weight of one or more of iron, calcium and zinc.
23. The non-brewed beverage of claim 16, further comprising peppermint flavoring and wherein the ethyl alcohol concentration is about 40%.
24. The non-brewed beverage of claim 16, further comprising flavor extracts of one or more of the following: lemon; orange; grapefruit; lime; peach; guava; apple; cranberry; blueberry; grape; pineapple; cherry; strawberry;

mango; papaya; peppermint; cinnamon; carrot; tomato; liquorice; coffee and coca.

25. The non-brewed beverage of claim 16, further comprising one or more of the following: fructose; corn syrup; sucrose; honey; glucose; sucralose; aspartame and stevia.

26. The non-brewed beverage of claim 16, further comprising supplemental caffeine in concentrations of 0.01% to 0.5% by weight.

27. The non-brewed beverage of claim 16, wherein the beverage is carbonated with CO₂ gas.

28. The non-brewed beverage of claim 16, further comprising one or more buffering agents from the group of: citric acid; tartaric acid; malic acid; succinic acid; ascorbic acid; phosphoric acid; potassium phosphate and sodium phosphate.

29. (Withdrawn)

30. (Withdrawn)

31. (Withdrawn)

32. (Withdrawn)

33. A beverage comprising alcohol in a concentration of 0.45% to 40%, and hydrolyzed protein in a concentration of 3.3 to 50 grams per liter, wherein the beverage is one of substantially clear and substantially translucent.

34. The beverage of claim 33, further comprising vitamin C in an amount of about 25% of the United States Food and Drug Administration's Daily Value (DV) in a serving.

35. The beverage of claim 33, wherein the beverage is carbonated.

IX. EVIDENCE APPENDIX

None.

X. RELATED PROCEEDINGS APPENDIX

None.